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Nos. 764 and 765

In the Supreme Court of the United States

OCTOBER TERM, 1943

ALFRED FENTON, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

RUSSELL G. SMITH, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. S. 181; R. F. 198)[1] is reported in 139 F. (2d) 608. The District Court wrote no opinion.

[1] The symbol (R. F.) refers to the Fenton record and the symbol (R. S.) to the Smith record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 30, 1943 (R. S. 188; R. F. 205). The petitions for certiorari were filed March 6, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the district court had power to adjudge petitioners, who were witnesses called upon to testify and produce documents in a suit brought by the Administrator of the Wage and Hour Division against a bank, guilty of contempt without requiring proof that the bank had employees covered by the Fair Labor Standards Act.

2. Whether it was necessary for the record on appeal [2] in the contempt proceeding to show that the District Court had jurisdiction over the action in which the orders disobeyed were issued, and if so whether there was a sufficient showing of such jurisdiction in the record on appeal to warrant affirmance of the contempt orders.

STATEMENT

On March 24, 1942, the Administrator of the Wage and Hour Division, United States Department of Labor, instituted an action against the Bank of America National Trust and Savings

[2] The District Court, of course, had the complaint and all other pleadings in the action against the Bank before it when the orders in question were issued.

Association, under Section 17 of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 *et seq.*) to restrain violations of the overtime and record-keeping provisions of said Act. The petitioners are officers and managing agents of the defendant bank, hereinafter referred to as the bank. Petitioner Smith is executive vice-president charged with the general administrative supervision and management of the bank, subject to the direction of the bank's president and board of directors (R. S. 96–97). Petitioner Fenton is a vice-president and chairman of the operating committee of the bank; he had been for ten years its personnel director (R. F. 114).

In the course of preparing the case for trial, respondent served notice on the bank that the deposition of Fenton, by oral examination, would be taken on August 17, 1942, and the witness was subpoenaed to appear and testify (R. F. 168). Fenton appeared as directed by the subpoena, represented by counsel for the bank (R. F. 4–38, 168). During the course of the deposition, petitioner Fenton was questioned concerning the hours worked by and the compensation paid to the bank's employees, and the nature of the wage and hour records kept. Counsel for the bank instructed Fenton not to answer these questions, and he accordingly refused to answer (R. F. 4–38).

Respondent, by motion filed September 30, 1942, applied to the District Court, pursuant to

Rule 37 (a) of the Federal Rules of Civil Procedure, for an order compelling Fenton to answer the questions (R. F. 2–3, 168). After a full hearing, the court by order dated October 13, 1942, directed Fenton to answer (R. F. 39, 168). Pursuant to this order Fenton appeared at the time and place directed by the court, and the questions which he had previously refused to answer were again propounded. Fenton again, upon advice of counsel, refused to answer any of the questions except one (R. F. 115–117, 169).

Meanwhile, on September 29, 1942, respondent, pursuant to Rule 34 of the Federal Rules of Civil Procedure, served on the bank and filed with the District Court, a motion for an order directing the bank to produce, and to permit respondent to inspect and copy, specified documents concerning the hours worked by and the compensation paid to the bank's employees (R. S. 2–6, 156). After hearing this motion, the court by order dated October 13, 1942, required the bank to produce and permit the respondent, his agents and attorneys, to inspect and copy the documents referred to, at the bank's main office, on a fixed date (R. S. 10–14, 156). On the date designated by the court, a request was made by the duly authorized representative of the respondent for production of the specified documents. Petitioner Smith, being aware of the order, and having the power and authority to comply therewith, re-

fused to produce the documents or take appropriate action for obedience thereto (R. S. 99).

On January 16, 1943, respondent instituted contempt proceedings in the District Court against Smith and Fenton, under Rule 37 (b) of the Federal Rules of Civil Procedure (R. S. 15–20; R. F. 41–44). The contempt proceedings were heard on February 15, March 3, and March 10, 1943 (R. S. 57, 149; R. F. 69, 166). At the conclusion of the hearings, the District Court found that the failure of the petitioners to obey the orders of October 13, 1942, "impaired, defeated, impeded, and prejudiced the rights and remedies" of the respondent and constituted civil contempt. The court accordingly denied motions to quash the orders to show cause (R. S. 55, 152; R. F. 68, 164), and directed that petitioners be imprisoned until they should comply with the court's orders (R. S. 155–161; R. F. 167–177). Upon petitioners' motions, the orders of commitment were stayed pending appeal (R. S. 153; R. F. 165).

Petitioners had based their refusals to obey the orders to testify and produce records upon assertions that none of the Bank's employees was within the coverage of the Fair Labor Standards Act and that therefore the court lacked jurisdiction to issue the orders. In the contempt proceeding, petitioners contended that the court would have jurisdiction to punish them for disobedience of its orders only if respondent proved that the Bank had employees who were covered

by the Act. In the Circuit Court of Appeals, petitioners contended that, because respondent had offered no such proof, the District Court's judgments committing them for contempt were erroneous and should be reversed. Relying upon averments in their verified returns to the orders to show cause, petitioners asserted that the only evidence in the record showed that the Bank had no employees who were covered by the Act; they contended that therefore the record affirmatively established that the District Court lacked jurisdiction.

The Circuit Court of Appeals held that it was clear that the District Court had jurisdiction of an action under Section 17 of the Fair Labor Standards Act and "was possessed of authority to order the production of documents and the answering of questions bearing upon any of the issues embraced within the pleadings" filed in such action; that the court's authority in the contempt proceeding was determined by its jurisdiction in the main action and not by the assertions in the answers in the contempt proceeding; and that it was not open to petitioners in the contempt proceeding to raise or have determined the issues involved in the main case (R. S. 187; R. F. 203–204). The Circuit Court accordingly affirmed the orders of commitment (R. S. 188; R. F. 205).[3]

[3] The Administrator, in the Court of Appeals, also argued that petitioners were not strangers to the main action but in

ARGUMENT

The authority of the court to order petitioners to produce records and to testify in proceedings before trial, and to commit them for contempt if they failed to do so, was clearly granted by Rules 26, 34 and 37 of the Federal Rules of Civil Procedure. Petitioner's argument is premised upon a misapprehension concerning the grounds upon which a witness may excuse his refusal to obey an order of the court to produce evidence or to testify, and also upon a misconception of the nature and scope of the court's authority or "jurisdiction" to commit for contempt.

1. Petitioners' sole ground for disobeying the orders to testify was the alleged lack of jurisdiction[1] of the District Court because, as claimed by petitioners, none of the Bank's employees was engaged in commerce or in the production of goods for commerce within the meaning of the Act. This same defense had previously been made by the Bank in a motion to dismiss the main ac-

fact represented the party defendant, and therefore the orders of commitment were interlocutory and were reviewable only on appeal from the final decree in the main action. The Court of Appeals rejected this contention, however, ruling that the officers of defendant corporation were not parties to the main action, but were individual contemnors (R. F. 203).

[1] Petitioners' misconception of the meaning of "jurisdiction" in this context is pointed out *infra*, pages 9–13.

tion (R. F. 67), which motion had been denied (R. F. 9).[5]

The court below was clearly correct in ruling that it was not within the province of petitioners, when called upon to testify as witnesses, to raise such an issue. The grounds on which a witness may take exception to a court order requiring the production of evidence or answering of questions are not co-extensive with the defenses available to the parties to the action, but are limited to the personal rights and privileges of the witness. *Nelson* v. *United States,* 201 U. S. 92, 115; *Blair* v. *United States,* 250 U. S. 273, 282–283. This Court, in affirming a contempt judgment in the *Nelson* case, held that it is not open to a witness ordered to testify "to make objections to the testimony" since "the tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal * * *." See also *Fairfield* v. *United States,* 146 Fed. 508, 509 (C. C. A. 8); *Levinstein* v. *E. I. DuPont De Nemours & Co.,* 258 Fed. 662, 665. Were witnesses free to raise other issues

[5] By reiterating this defense in the contempt proceedings, petitioners sought to force the court to follow an order of proof which it had refused to follow in denying the motion to dismiss, that is, to try the question of coverage separately and in advance of the issue of compliance. If petitioners were correct in their contention, witnesses would thus be in a position to take out of the court's hands the determination of the order of proof and the course of the trial.

such as those asserted here by petitioners, endless delay and confusion would result,[6] the witnesses and not the court would control the conduct of the trial, and an orderly trial would be impossible. The exceptions taken by petitioners to the contempt orders in the instant case relate to the issues and the merits in the main action between the Administrator and the bank; the objections are not based upon any privilege or right personal to petitioners, and therefore cannot operate to void the contempt orders.

Even if petitioners are correct in characterizing their objections as "jurisdictional," they are not entitled to raise such an issue. In *Blair* v. *United States, supra,* this Court stated that in the ordinary case it is "no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not" (250 U. S. at 282). But, as pointed out below, the grounds upon which petitioners have attacked the contempt orders involve the merits of the main action and not the jurisdiction of the court.

2. Even if it were open to petitioners to question the court's jurisdiction, the defense that the Act was inapplicable did not go to the court's jurisdiction but to the merits of the main action. The

[6] In the instant case petitioners' persistent refusal to give any evidence or to produce the records of the Bank has already delayed the trial for considerably more than a year, the orders of the court directing petitioners to testify and produce records having been issued on October 13, 1942.

decisions upon which petitioners rely (*Ex parte Sawyer*, 124 U. S. 200, *Ex parte Fisk*, 113 U. S. 713, and other cases cited in their brief, pp. 18–20)[7] involved "lack of jurisdiction" in the sense that the court had no power to act, so that any orders issued by it were void. It is clear that the denial that the Act was applicable to the Bank's employees did not involve the jurisdiction of the court in this sense. The authorities consistently hold that such a defense goes to the merits of the cause, and not to the jurisdiction of the court to hear and determine the action and to issue valid orders. As this Court has stated, jurisdiction means "the power of the court to adjudicate between the parties" (*Swift & Co.* v. *United States*, 276 U. S. 311, 327); "the power to decide a justiciable controversy [including] questions of law as well as of fact" (*Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305). Jurisdiction is not challenged by denial of the merits of the claim nor is it affected by the conclusion which the court may

[7] All these cases involved disobedience of injunctions, not disobedience of orders to testify or produce evidence in the course of preparation of the case for trial. As we have shown above, disobedience of an order of the latter kind cannot be justified by a showing that the court issuing it lacked jurisdiction. Even in contempt proceedings for violation of injunction decrees, the only defect that can be raised is lack of jurisdiction in the sense of lack of "power to hear and determine a cause." See *Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 857, 859 (C. C. A. 2); *O'Hearne* v. *United States*, 66 F. (2d) 933, 935 (App. D. C.); *E. Ingraham Co.* v. *Germanow*, 4 F. (2d) 1002, 1003 (C. C. A. 2); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7).

reach on the merits, "for the power to decide necessarily carries with it the power to decide wrongly as well as the power to decide rightly." *Thompson* v. *Terminal Shares*, 89 F. (2d) 652, 655 (C. C. A. 8); see also *Walling* v. *Addison Miller Co.*, 138 F. (2d) 629 (C. C. A. 8), certiorari denied March 13, 1944, No. 670, this Term

In the *Binderup* case, *supra*, a suit for triple damages under the Anti-Trust Laws, it was claimed, as in the instant case, that the transactions in question were intrastate and therefore outside the scope of the Federal statute. The ruling of the District Court dismissing the complaint was affirmed by the Circuit Court of Appeals "for want of jurisdiction in the District Court." This Court, overruling the contention that a jurisdictional question was involved, pointed out that "an issue as to the legal sufficiency of the facts alleged" or an issue as to the merits of the action does not go to the court's jurisdiction. The court's "jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it" (263 U. S., at pp. 305–306). In *General Investment Co.* v. *New York Central R. R. Co.*, 271 U. S. 228, this Court fur-

ther elaborated upon and clarified the meaning of "jurisdiction," pointing out (pp. 230–231):

> * * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits.[8]

That the district court in the instant case had "power to entertain" the main action brought by the Administrator against the Bank, and to "consider the merits" of the action, seems too plain for argument. Section 17 of the Fair Labor Standards Act expressly confers upon the district courts jurisdiction to enjoin violations of the Act. The action in which petitioners were ordered to testify and product records was undeniably an action under this federal statute. The complaint set forth "a substantial claim under a federal

[8] See to the same effect *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28; *Erickson* v. *United States*, 264 U. S. 246; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302; *Smyth* v. *Asphalt Belt Ry.*, 267 U. S. 326; *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593; *Langnes* v. *Green*, 282 U. S. 531; *Howat* v. *Kansas*, 258 U. S. 181; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 857, 861 (C. C. A. 2); *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211 (C. C. A. 2); *Locke* v. *United States*, 75 F. (2d) 157 (C. C. A. 5), certiorari denied, 295 U. S. 733; *Trickett* v. *Kaw Valley Drainage District*, 25 F. (2d) 851 (C. C. A. 8), certiorari denied, 278 U. S. 624; *National Ben. Life Ins. Co.* v. *Shaw-Walker Co.*, 111 F. (2d) 497 (App. D. C.); *In re Stuart*, 114 F. (2d) 825 (App. D. C.); *Fletcher* v. *McMahon*, 121 F. (2d) 729 (App. D. C.).

statute" and therefore presented "a case within the jurisdiction of the court" (*Binderup* v. *Pathe Exchange, supra,* at p. 305).[9] Thus, even if petitioners were entitled to challenge the court's jurisdiction, they have not challenged jurisdiction by denying the applicability of the Act.

3. Petitioners contend that their assertion that none of the Bank's employees was covered by the Act constitutes "the sole evidence" in the record as to the District Court's jurisdiction, that the record on appeal contains no showing of jurisdiction, and that the Court of Appeals erroneously went outside of the record and took cognizance of the allegations of the complaint in ruling that the District Court had jurisdiction (br. in support of pet., pp. 17, 21–25).[10] Even if it be assumed that petitioners were entitled to question the court's jurisdiction, and also that there is merit in the contention that the contempt orders are void unless the jurisdiction of the District Court

[9] The district court, having jurisdiction to entertain the main action, was authorized by Rules 26 and 34 of the Rules of Civil Procedure to order petitioners to produce records and to testify in advance of trial, and by Rule 37 to commit them for contempt for refusal to obey such orders.

[10] In making this contention, petitioners seek to capitalize upon their own omission, since, as appellants, they were primarily responsible for the content of the record on appeal. Under the circumstances, it would hardly be a "shocking" denial of due process (cf. pet. p. 18) for the court to take cognizance of the jurisdictional allegations in the omitted pleadings. However, as pointed out in the text, the jurisdictional allegations sufficiently appear from the pleadings which were included in the record.

affirmatively appears from the record *on appeal*,[11] petitioners are in error in stating that the record on appeal contains no showing of jurisdiction. As we have shown above, whether the District Court had jurisdiction depends, not (as petitioners' argument assumes) upon whether any of the bank's employees were covered by the Act, but upon whether the suit against the bank was one which the District Court had "power to entertain." Although the complaint in the main action was omitted from the record on appeal, the nature of the complaint and the jurisdiction of the court adequately appear from other pleadings and admissions which were included in the record.[12]

Thus, in their returns to the orders to show cause, petitioners stated that the main action "is one for an injunction brought under the provisions of the Fair Labor Standards Act" (R. F. 47; R. S. 22), and that the complaint charged violation of the minimum, overtime, and record-keeping requirements of the Act (R. F. 49; R. S. 25). Again in the memorandum of points and authorities, which was made a part of the notice of motion

[11] The District Court, of course, had the complaint and all other pleadings in the main action before it when it issued the orders.

[12] The Circuit Court of Appeals, in a footnote to its opinion (R. F. 199; R. S. 182), said that, since the complaint and answer in the main action were not in the record, its statements regarding the condition of the pleadings were obtained from the briefs. The court apparently overlooked the fact that the necessary information appears in other pleadings and admissions in the record.

to quash the orders to show cause (R. F. 63; R. S. 50), petitioners asserted that the Administrator's action against the Bank was for an injunction brought "under Section 17 of the Fair Labor Standards Act * * *" (R. F. 63; R. S. 51). In the hearing before the District Court, the transcript of which is in the record, petitioners' counsel conceded that the complaint alleged that the bank's employees were engaged in interstate commerce (R. F. 133).[13] Indeed, the petitions for certiorari (p. 2) themselves state that the complaint sought an injunction against the bank for

[13] Petitioners, in their brief in the Court of Appeals, expressly stated that they did not challenge "the general jurisdiction over the parties litigant and the subject matter in the suit in the District Court" (app. br. p. 17). In view of this admission it has been difficult to understand petitioners' contention that the court had no jurisdiction to order them to testify or produce records relating to the subject matter in the main suit or to hold them in contempt for disobeying such orders. Their reasoning seems to be that the contempt proceeding is an entirely separate and independent action (br. in support of pet., p. 12), and that jurisdiction in the contempt proceeding must be determined without any reference to the court's jurisdiction over the main action. The fallacy in this contention is that a civil contempt proceeding, such as is here involved, instituted to compel obedience to court orders issued for the protection and enforcement of the rights of a party litigant, is not an independent action; on the contrary, the authorities consistently hold that such a proceeding is ancillary to and a part of the main action. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444–445; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328–329. It seems clear that jurisdiction over the subject matter in the main action suffices to establish the jurisdiction of the court over contempt proceedings for disobedience of orders issued in the main action.

violating the Fair Labor Standards Act. Thus the basis of the District Court's jurisdiction adequately appears from the record on appeal without reference to the complaint or any other information outside of the record.[14]

4. Petitioners' claim that they were denied due process is no more than an assertion in another form that the court lacked jurisdiction because of petitioners' denial that the Act was applicable to the Bank's employees. Determination of the merits of the main cause of action is not an element of due process in contempt proceedings. Every requirement of due process was met in the contempt proceeding here. Petitioners were informed of the nature and character of the complaint against them and were given ample opportunity to make defense. They were represented by counsel of their choice and hearings were extended over such a period of time as to afford full opportunity to prepare and submit to the court any evidence they may have desired in justification or in mitigation of their conduct.[15] Thus,

[14] The complaint is not the sole source of jurisdictional facts; it suffices if the jurisdictional facts appear "somewhere in the record." *Briges* v. *Sperry*, 95 U. S. 401; *Robertson* v. *Cease*, 97 U. S. 646; *Barnette* v. *Wells Fargo National Bank*, 270 U. S. 438.

[15] The Orders to Show Cause were issued January 16, 1943, returnable on February 1, 1943 (R. F. 45; R. S. 21). On February 15, 1943, the evidence and arguments of counsel were partially heard and the matters continued to March 3, 1943 (R. S. 131; R. F. 143), and again to March 10, 1943 (R. S. 149; R. F. 161), when the orders of commitment were entered.

the requirements of due process outlined in *Cooke* v. *United States*, 267 U. S. 517, were fully complied with.

CONCLUSION

The decision below is plainly correct, and there is no conflict of authorities. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

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